

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

-----  
**TRAVELERS CASUALTY AND SURETY COMPANY as  
Administrator for RELIANCE INSURANCE COMPANY,**

**Civil Action No.:  
07-CV-6915 (DLC)**

**ECF CASE**

**Plaintiff,**

**vs.**

**THE DORMITORY AUTHORITY OF THE STATE OF NEW  
YORK, TDX CONSTRUCTION CORP. and KOHN,  
PETERSON, FOX & ASSOCIATES, P.C.,**

**Defendants.**

-----  
**DORMITORY AUTHORITY OF THE STATE OF NEW  
YORK, and TDX CONSTRUCTION CORP.,**

**Third-Party Plaintiff,**

**vs.**

**TRATAROS CONSTRUCTION, INC.**

**Third-Party Defendants**

-----  
**TRATAROS CONSTRUCTION, INC. and TRAVELERS  
CASUALTY AND SURETY COMPANY,**

**Fourth-Party Plaintiffs,**

**vs.**

**CAROLINA CASUALTY INSURANCE COMPANY,  
BARTEC INDUSTRIES INC., DAYTON SUPERIOR  
SPECIALTY CHEMICAL CORP., a/k/a DAYTON BRANDS  
INC., t/a TEC, KEMPER CASUALTY INSURANCE  
COMPANY d/b/a KEMPER INSURANCE COMPANY,  
GREAT AMERICAN INSURANCE COMPANY,  
NATIONAL UNION FIRE INSURANCE COMPANY OF  
PITTSBURGH, PA., UNITED STATES FIRE INSURANCE  
COMPANY, ALLIED WORLD ASSURANCE COMPANY (U.S.)  
INC. f/k/a COMMERCIAL UNDERWRITERS INSURANCE**

**COMPANY, ZURICH AMERICAN INSURANCE COMPANY  
d/b/a ZURICH INSURANCE COMPANY, OHIO CASUALTY  
INSURANCE COMPANY d/b/a OHIO CASUALTY GROUP,  
HARLEYSVILLE MUTUAL INSURANCE COMPANY (a/k/a  
HARLEYSVILLE INSURANCE COMPANY), JOHN DOES 1-20,  
and XYZ CORPS. 1-12,**

**Fourth Party Defendants.**

-----

**NATIONAL UNION'S ANSWER TO THE FOURTH-PARTY COMPLAINT,  
AFFIRMATIVE DEFENSES, JURY DEMAND, CROSS CLAIM  
AND ANSWER TO CROSS-CLAIMS**

Fourth-Party Defendant National Union Fire Insurance Company of Pittsburgh,  
PA ("National Union"), as and for its answer to the Amended Fourth-Party Complaint  
(the "Fourth-Party Complaint"):

1. Denies knowledge and information sufficient to form a belief as to the truth of the allegations as set forth in paragraphs "1" through "8" of the Fourth-Party Complaint.
2. Admits National Union is incorporated in the State of Pennsylvania and maintains a principal place of business at 70 Pine Street, New York, New York and otherwise denies in the form alleged the allegations as set forth in paragraph "9" of the Fourth-Party Complaint.
3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations as set forth in paragraphs "10" through "16" of the Fourth-Party Complaint.
4. Refers the Court to the referenced subcontract for the particulars thereof and otherwise denies knowledge and information sufficient to form a belief as to the truth

of the allegations as set forth in paragraphs “17” through “18” of the Fourth-Party Complaint.

5. Refers the Court to the referenced pleadings for the particulars thereof, and otherwise denies knowledge or information sufficient to form a belief as to the truth of the allegations as set forth in paragraphs “19” through “29” of the Fourth-Party Complaint.

6. Refers the Court to the referenced contracts, subcontracts and bonds for the particulars thereof, and otherwise denies knowledge or information sufficient to form a belief as to the truth of the allegations as set forth in paragraphs “30” through “51” of the Fourth-Party Complaint.

7. Refers the Court to the referenced pleadings for the particulars thereof, and otherwise denies knowledge or information sufficient to form a belief as to the truth of the allegations as set forth in paragraphs “52” through “61” of the Fourth-Party Complaint.

***First Count***

8. In response to the allegations set forth in paragraph “62” repeats and realleges National Union’s response to each and every allegation as set forth in paragraphs “1” through “61” of the Fourth-Party Complaint as if more fully set forth herein.

9. Denies knowledge and information sufficient to form a belief as to the truth of the allegations as set forth in paragraphs “63” through “70” of the Fourth-Party Complaint.

***Second Count***

10. In response to the allegations set forth in paragraph “71” repeats and realleges National Union’s response to each and every allegation as set forth in paragraphs “1” through “70” of the Fourth-Party Complaint as if more fully set forth herein.

11. Denies knowledge and information sufficient to form a belief as to the truth of the allegations as set forth in paragraphs “72” through “77” of the Fourth-Party Complaint.

***Third Count***

12. In response to the allegations set forth in paragraph “78” repeats and realleges National Union’s response to each and every allegation as set forth in paragraphs “1” through “77” of the Fourth-Party Complaint as if more fully set forth herein.

13. Denies knowledge and information sufficient to form a belief as to the truth of the allegations as set forth in paragraphs “79” through “84” of the Fourth-Party Complaint.

***Fourth Count***

14. In response to the allegations set forth in paragraph “85” repeats and realleges National Union’s response to each and every allegation as set forth in paragraphs “1” through “84” of the Fourth-Party Complaint as if more fully set forth herein.

15. Denies knowledge and information sufficient to form a belief as to the truth of the allegations as set forth in paragraphs “86” through “88” of the Fourth-Party Complaint.

***Fifth Count***

16. In response to the allegations set forth in paragraph “89” repeats and realleges National Union’s response to each and every allegation as set forth in paragraphs “1” through “88” of the Fourth-Party Complaint as if more fully set forth herein.

17. Denies knowledge and information sufficient to form a belief as to the truth of the allegations as set forth in paragraphs “90” through “96” of the Fourth-Party Complaint.

***Sixth Count***

18. In response to the allegations set forth in paragraph “97” repeats and realleges National Union’s response to each and every allegation as set forth in paragraphs “1” through “96” of the Fourth-Party Complaint as if more fully set forth herein.

19. Denies knowledge and information sufficient to form a belief as to the truth of the allegations as set forth in paragraphs “98” through “104” of the Fourth-Party Complaint.

***Seventh Count***

20. In response to the allegations set forth in paragraph “105” repeats and realleges National Union’s response to each and every allegation as set forth in

paragraphs “1” through “104” of the Fourth-Party Complaint as if more fully set forth herein.

21. Denies knowledge and information sufficient to form a belief as to the truth of the allegations as set forth in paragraphs “106” through “112” of the Fourth-Party Complaint.

***Eighth Count***

22. In response to the allegations set forth in paragraph “113” repeats and realleges National Union’s response to each and every allegation as set forth in paragraphs “1” through “112” of the Fourth-Party Complaint as if more fully set forth herein.

23. Denies knowledge and information sufficient to form a belief as to the truth of the allegations as set forth in paragraphs “114” through “121” of the Fourth-Party Complaint.

***Ninth Count***

24. In response to the allegations set forth in paragraph “122” repeats and realleges National Union’s response to each and every allegation as set forth in paragraphs “1” through “121” of the Fourth-Party Complaint as if more fully set forth herein.

25. Denies knowledge and information sufficient to form a belief as to the truth of the allegations as set forth in paragraphs “123” through “124” of the Fourth-Party Complaint.

26. Admits that National Union is an insurance company organized and existing under the laws of the Commonwealth of Pennsylvania and is duly licensed by the

Insurance Department of the State of New York to issue policies of insurance in the State of New York and otherwise denies the allegations in the form set forth in paragraph “125” of the Fourth-Party Complaint.

27. Denies knowledge and information sufficient to form a belief as to the truth of the allegations as set forth in paragraphs “126” through “130” of the Fourth-Party Complaint.

28. Refers the Court to the referenced subcontract for the particulars thereof, and otherwise denies knowledge or information sufficient to form a belief as to the truth of the allegations as set forth in paragraphs “131” through “133” of the Fourth-Party Complaint.

29. Denies knowledge and information sufficient to form a belief as to the truth of the allegations as set forth in paragraph “134” of the Fourth-Party Complaint.

30. Admits that National Union issued an umbrella policy BE 701-37-75 (the “National Union Policy”) to Trataros Construction, Inc. (“Trataros”) for the Policy Period April 1, 1999 to April 1, 2000, refers the Court to the National Union Policy for the particulars thereof, including the identity of the insureds and additional insureds thereunder, and otherwise denies the allegations as set forth in paragraph “135” of the Fourth-Party Complaint.

31. Refers the Court to the referenced policies for the particulars thereof and otherwise denies knowledge and information sufficient to form a belief as to the truth of the allegations as set forth in paragraphs “136” through “139” of the Fourth-Party Complaint.

32. Admits that National Union issued the National Union Policy, refers the Court to the National Union Policy for the particulars thereof, and otherwise denies the allegations as set forth in paragraph “140” of the Fourth-Party Complaint.

33. Admits that National Union issued the National Union Policy to Trataros, refers the Court to the National Union Policy for the particulars thereof, including the identity of insureds and additional insureds thereunder, and otherwise denies the allegations as set forth in paragraph “141” of the Fourth-Party Complaint.

34. Denies knowledge and information sufficient to form a belief as to the truth of the allegations as set forth in paragraphs “142” through “144” of the Fourth-Party Complaint.

35. Denies the allegations as set forth in paragraphs “145” through “148” of the Fourth-Party Complaint to the extent they are directed to National Union and/or the National Union Policy.

36. Denies that Fourth-Party Plaintiffs are entitled to any declaration that “coverage exists” under the National Union Policy, and otherwise denies knowledge and information sufficient to form a belief as to what Fourth-Party Plaintiffs “request” and/or the truth of the allegations as set forth in paragraph “149” of the Fourth-Party Complaint.

#### **AFFIRMATIVE DEFENSES**

#### **AS AND FOR A FIRST DEFENSE**

The Fourth Party Complaint fails to state a claim upon which relief may be granted against National Union.



**AS AND FOR A SECOND DEFENSE**

The Fourth Party Complaint fails to present a justiciable controversy as to National Union.

**AS AND FOR A THIRD DEFENSE**

No coverage is available under the National Union Policy unless and until Fourth-Party Plaintiffs demonstrate proper exhaustion of all applicable underlying insurance and/or retentions, a condition precedent to coverage under the National Union Policy.

**AS AND FOR A FOURTH DEFENSE**

The National Union Policy requires that all Scheduled Underlying Insurance be maintained in full force and effect; to the extent this condition is not complied with, National Union's obligations under the National Union Policy, if any, can be no greater than those which would exist had these this condition been complied with.

**AS AND FOR A FIFTH DEFENSE**

Fourth Party Plaintiffs' claims may be barred may be barred in whole or in part by the terms, conditions, exclusions and limitations of the National Union Policy.

**AS AND FOR A SIXTH DEFENSE**

Fourth Party Plaintiffs' claims may be barred in whole or in part by their failure to mitigate, minimize or avoid the alleged damages for which they are answerable.

**AS AND FOR A SEVENTH DEFENSE**

Fourth Party Plaintiffs' claims may be barred in whole or in part by any failure to provide National Union with timely and proper notice of an occurrence, claim or suit, as required by the National Union Policy.

**AS AND FOR AN EIGHTH DEFENSE**

Fourth Party Plaintiffs' claims may be barred in whole or in part by the doctrine of unclean hands.

**AS AND FOR A NINTH DEFENSE**

Fourth Party Plaintiffs' claims may be barred in whole or in part by any impairment of National Union's right to subrogation, indemnity or contribution.

**AS AND FOR A TENTH DEFENSE**

Fourth Party Plaintiffs' claims may be barred in whole or in part by the applicable statute of limitations, by estoppel, and/or through laches.

**AS AND FOR AN ELEVENTH DEFENSE**

National Union may be entitled to assert any applicable terms, conditions, exclusions and other language of underlying insurance policies in response to the claims at issue.

**AS AND FOR A TWELFTH DEFENSE**

National Union's obligations, if any, under the National Union Policy are subject to the applicable limits of liability set forth therein.

**AS AND FOR A THIRTEENTH DEFENSE**

The National Union Policy is not obligated to "drop down" and/or assume the obligations of an insured and/or other insurers as to underlying insurance.

**AS AND FOR A FOURTEENTH DEFENSE**

Coverage under the National Union Policy if any, is limited to, *inter alia*, claims for damages arising from "Property Damage" caused by an "Occurrence," which is defined as "an accident."

**AS AND FOR A FIFTEENTH DEFENSE**

Any "Property Damage" which was "expected or intended from the standpoint of the insured" is excluded under the National Union Policy.

**AS AND FOR A SIXTEENTH DEFENSE**

National Union's obligations under the National Union Policy are excess to any other policy of insurance providing coverage for damages covered in whole or in part by the National Union Policy, other than insurance written specifically as excess to the National Union Policy.

**AS AND FOR A SEVENTEENTH DEFENSE**

No coverage is available under the National Union Policy to any natural person or entity not an insured thereunder.

**AS AND FOR A EIGHTEENTH DEFENSE**

No coverage is available under the National Union Policy for any liability arising from an insured's breach of a contract to provide insurance for another natural person or entity and/or any failure to name such a person or entity as an insured to an insurance policy.

**AS AND FOR A NINETEENTH DEFENSE**

No coverage is available under the National Union Policy for "property damage" to "Impaired Property," as that term is defined therein.

**AS AND FOR A TWENTIETH DEFENSE**

No coverage is available under the National Union Policy for "property damage" to an insured's "Work" which is included in the "Products-Completed Operations Hazard," as those terms are defined therein.

**AS AND FOR A TWENTY-FIRST DEFENSE**

No coverage is available under the National Union Policy for “property damage” to an insured’s “Product,” as that term is defined therein.

**AS AND FOR A TWENTY-SECOND DEFENSE**

No coverage is available under the National Union Policy for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal and/or disposal of an Insured’s “Product” or “Work” or “Impaired Property,” as those terms are defined therein, if such product, work or property is withdrawn from use because of a known or suspected deficiency, defect, or inadequacy with respect thereto.

**AS AND FOR A TWENTY-THIRD DEFENSE**

No coverage may be available under the National Union Policy for “property damage” to property being installed, erected or worked upon by an insured, or its agents or subcontractors.

**AS AND FOR A TWENTY-FOURTH DEFENSE**

No coverage may be available under the National Union Policy for “property damage” arising out of any project insured under a “wrap-up” or any similar rating plan.

**AS AND FOR A TWENTY-FIFTH DEFENSE**

No coverage may be available under the National Union Policy for property damage arising out of any professional services rendered by or on behalf of an insured.

**AS AND FOR A TWENTY-SIXTH DEFENSE**

National Union may have additional defenses that cannot be articulated due to the generality of the Fourth Party Complaint, Fourth-Party Plaintiffs’ failure to meet their obligation to provide information about the underlying actions or claims, the absence of

insuring documents, or the stage of this litigation. Accordingly, National Union reserves the right to supplement the foregoing and to assert additional defenses as may appear after Fourth-Party Plaintiffs particularize their claims, and after discovery of information concerning the matters set forth in the Fourth Party Complaint.

**CROSS-CLAIM AGAINST FOURTH PARTY DEFENDANTS CAROLINA CASUALTY INSURANCE COMPANY, BARTEC INDUSTRIES INC., DAYTON SUPERIOR SPECIALTY CHEMICAL CORP., A/K/A DAYTON BRANDS INC., T/A TEC, KEMPER CASUALTY INSURANCE COMPANY D/B/A KEMPER INSURANCE COMPANY, GREAT AMERICAN INSURANCE COMPANY, UNITED STATES FIRE INSURANCE COMPANY, ALLIED WORLD ASSURANCE COMPANY (U.S.) INC. F/K/A COMMERCIAL UNDERWRITERS INSURANCE COMPANY, ZURICH AMERICAN INSURANCE COMPANY D/B/A ZURICH INSURANCE COMPANY, OHIO CASUALTY INSURANCE COMPANY D/B/A OHIO CASUALTY GROUP, HARLEYSVILLE MUTUAL INSURANCE COMPANY (A/K/A HARLEYSVILLE INSURANCE COMPANY), JOHN DOES 1-20, AND XYZ CORPS. 1-12**

1. If Fourth-Party Plaintiff sustained any damages as alleged in the Fourth Party Complaint, which National Union denies, then such damages were caused by reason of the culpable conduct, acts or omissions, negligence, strict products liability, statutory violation, breach of contract, obligation or warranty of the Fourth Party Defendants identified above.

2. By reason of the foregoing, National Union is entitled to indemnification or contribution from, and to have judgment against the Fourth Party Defendants identified above, for all of any verdict or judgment that Fourth Party Plaintiff may recover against National Union.

**ANSWER TO CROSS-CLAIMS OF FOURTH-PARTY DEFENDANT  
BARTEC INDUSTRIES, INC.'S CROSS-CLAIMS**

National Union denies the cross-claim asserted by Fourth Party Defendant Bartec Industries, Inc. in its entirety and, to the extent applicable, incorporates the foregoing affirmative defenses by reference.

**ANSWER TO CROSS-CLAIMS OF FOURTH-PARTY DEFENDANT  
ZURICH AMERICAN INSURANCE COMPANY'S CROSS-CLAIMS**

National Union denies the cross-claim asserted by Fourth Party Defendant Zurich American Insurance Company in its entirety and, to the extent applicable, incorporates the foregoing affirmative defenses by reference.

**ANSWER TO ALL OTHER CROSS-CLAIMS**

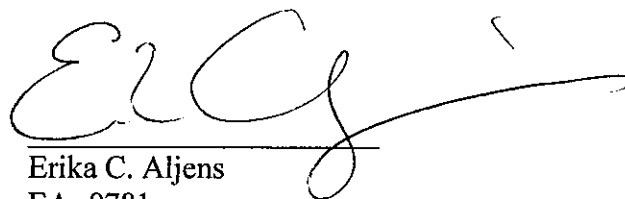
National Union denies all other cross-claims asserted against it and, except as may be inconsistent with the foregoing, denies each and every allegation in support thereof, and, to the extent applicable, incorporates the foregoing affirmative defenses by reference.

WHEREFORE, National Union seeks judgment dismissing the Fourth Party Complaint and all cross-claims against it with prejudice, along with any such other and further relief as this Court deems just and proper.

**JURY DEMAND**

National Union demands a trial by jury as to any issues so triable.

*New York, New York*  
*January 25, 2008*

A handwritten signature in black ink, appearing to read 'E.C. Aljens', with a long horizontal flourish extending to the right.

Erika C. Aljens

EA -9781

Law Offices of Green & Lavelle

110 William Street, 18<sup>th</sup> Floor

New York, New York 10038

(212) 266-5880

***Attorneys for Fourth-Party Defendant***

***National Union Fire Insurance Company of  
Pittsburgh, PA***